**Kvaerner Songer, Inc. *and* Local 334, Laborers International Union of North America, AFL–CIO *and* Michael Wilson.**

**Kvaerner Songer, Inc. *and* Local 334, Laborers International Union of North America, AFL–CIO *and* Clyde Escobar III, Jesus Alcorta, Eric Garza, Sergio Garza, and Rene Gregorio Ramos.** Cases 7–CA–45463, 7–CA–45637, 7–CB–13451, and 7–CB–13458

December 16, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 25, 2003, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint in this case alleges that Local 334, Laborers International Union of North America, AFL–CIO (the Union) unlawfully demanded that the Employer refrain from hiring the Charging Parties, who were union members, because they had not been referred to the Employer through the Union's hiring hall, and that the Employer unlawfully acquiesced in those demands. The General Counsel alleges that the parties' hiring hall arrangement was nonexclusive, and therefore the Union was not privileged to insist on the hiring of only employees referred through the hall.

As discussed below, the judge found that the hiring hall arrangement was exclusive, and that the Charging Parties were not discriminated against for an unlawful reason. The General Counsel excepts, claiming among other things, that the judge should have found that the hiring hall arrangement was nonexclusive and, therefore, that the Respondents discriminated against the Charging Parties by rejecting their efforts to obtain or retain work with the Employer on their own, i.e., not through the hiring hall. We find merit to those exceptions.

For the reasons set forth below, we reverse the judge's decision and find that the hiring hall arrangement between the Employer and the Union was nonexclusive. Therefore, the Union violated Section 8(b)(1)(A) and (2) by interfering with the Charging Parties' employment with the Employer, and the Employer violated Section 8(a)(3) and (1) by acquiescing in the Union's unlawful demands that it terminate or refuse to hire the Charging Parties.

[1] The Union and the Employer both filed answering briefs that were rejected by the Executive Secretary's office as untimely. The Employer filed a motion to accept as timely its answering brief. The Board, Chairman Battista dissenting, denied the motion. Therefore, we have not considered the answering briefs.

## I. BACKGROUND AND FACTS

In the fall of 2002,[2] National Steel Corporation contracted with the Employer, a construction company, to undertake the project involved in this case: namely, to rebrick the "number 1 stove" at the "A blast furnace" at National Steel's Zug Island facility near Detroit, Michigan. During 2000, the Employer had performed similar work on the "B furnace" at this facility. The 2000 project was the subject of a Board decision involving the same Union and Employer. *Laborers Local 334 (Kvaerner Songer)*, 335 NLRB 597 (2001).

The Employer received approval from the Laborers' International Union, via an extension request, that the National Maintenance Agreement (NMA) between the Employer and the International Union would apply to this project. Article XIX, section 1, of the NMA provides:

> The Employer agrees to hire craftworkers in any territory where work is being performed or is to be performed *in accordance with the hiring procedure existing in the territory where the work is being performed, or is to be performed*; however, in the event the Local Union is unable to fill the request of the Employer for employees within a forty-eight (48) hour period after such request for employees (Saturday, Sundays and holidays excepted), the Employer may employ workmen from any source. [Emphasis added.]

The General Counsel contends that the quoted NMA provision incorporates by reference the terms of the agreement between the Union and the Detroit Chapter of the Associated General Contractors (the Local Agreement), which established a nonexclusive hiring hall arrangement. Article IV of the Local Agreement provides:

> 1. (a) Beyond the employer's regular employees, including laid-off, laid off and collecting unemployment and/or transferred from another project of the same employer, the employer agrees to give the local union in the area an opportunity to supply any additional employees.
>
> (b) Regular employees shall be defined as one who has been on the payroll of said employer within the immediate past nine (9) months.

[2] All dates are in 2002 unless otherwise indicated.

> 2. When requested, the Union agrees to furnish competent workers upon notification to the Business Manager or Business Agent of the Union and further, the Employer agrees that beyond his regular employees he will give the Local Union in the area an opportunity to supply any additional employees. The Employer retains his right of freedom of selection of employees from among all applicants.

The Employer is not a signatory to the Local Agreement, although, in a prior case, the Employer and the Union stipulated that the work performed at Zug Island in 2000 was governed by that agreement.[3] In addition, the Employer, through its attorney, Geoffrey Beeson, stated in this case that article IV of the Local Agreement applied, as it was incorporated by reference in the NMA.

The Employer's work on this new Zug Island project was to begin on Tuesday, September 3 (the day after Labor Day). On Friday, August 30, the Employer's general foreman, Tony Peace, who was not normally based in the Detroit area, called Timothy Rushlow, a manager at the Employer's nearby Romulus, Michigan office,[4] and asked him to obtain five laborers to work at Zug Island starting on September 3. Rushlow called the Local 334 hiring hall, but was unable to reach anyone. He left messages on the cell phones of two union officials. When he had not heard from the Union by the morning of September 3, Rushlow called Clyde Escobar, one of the Charging Parties, who had worked for the Employer on a prior job. He asked Escobar to come to the jobsite and bring four other laborers.

Escobar and four other of the Charging Parties arrived at the jobsite later that morning, September 3. All of the five were members of Local 334. Foreman Peace and Jeff Tackett, a union business agent, met them at the facility's gate. Tackett told Peace that he "didn't know where these guys came from," and said that if the five were hired, the Union would file a grievance because they were not referrals from the Local 334 hiring hall and hiring them would violate article XIX of the NMA. Tackett also said to Peace: "[O]ur Union Hall 334, we supply all the men on these jobs," and "[Y]ou just can't hire anybody you feel like hiring." At about this time, a steward told Escobar and the others that they could not work because they were not on the out-of-work list. Escobar then left with the four other men, and the hiring hall dispatched five other Local 334 members later that day. Peace later told Manager Rushlow that he had turned the Charging Parties away because Tackett had threatened to file a grievance and would not let them work.

Early on September 4, after hearing about a possible job, Charging Party Michael Wilson arrived at the Employer's jobsite seeking work. Wilson, also a Local 334 member, was met by Andre Laurain, one of the Employer's supervisors. Although Wilson had not been referred by the hiring hall, he told Laurain that he was "from the union hall." Laurain hired Wilson and another employee and sent them to an orientation. However, after about half an hour, Laurain told Wilson that he had to "let him go," explaining that he had spoken with Scott Covington (from the Union), who "calls the shots," and that Covington did not want him there.

Between September 2002 and January 2003, the Employer hired approximately 60 laborers for the Zug Island project. All were dispatched by the Union's hiring hall except three "regular" employees of the Employer.[5]

On other projects, union members regularly sought and received jobs by calling companies directly, without going through the hiring hall. The judge also found that "on some occasions in the past, the Union was aware that some of the Charging Parties had obtained employment without going through the hall and did not do anything to prevent them from doing so."

Following the filing of unfair labor practice charges, the General Counsel issued a complaint, alleging that the Local Agreement applied to the 2002 Zug Island project, that this agreement did not create an exclusive hiring hall arrangement, and that the Union's interference with the Charging Parties' employment violated Section 8(b)(1)(A) and (2), and that the Employer's refusal to hire the Charging Parties violated Section 8(a)(3) of the Act.

## II. THE JUDGE'S DECISION

The judge recommended dismissing the complaint. He found it immaterial whether the NMA or the Local Agreement applied to the project because he concluded that the Union and the Employer had "established an exclusive hiring hall by practice and operation." He found that the Union has a duty of fair representation to its members in its operation of the exclusive hiring hall, but noted that this duty is breached only if the Union gives preference to one member over another on an impermissible basis, such as to support the incumbent union leadership. He found that although the Union discriminated against the Charging Parties, it did not do so in a manner that would "encourage or discourage membership in any labor organization." Rather, he found that the

[3] *Kvaerner Songer*, 335 NLRB, supra at 598.

[4] The judge described Rushlow as a "Songer *employee*" (emphasis added). We note that Rushlow is an admitted manager of the Employer.

[5] Such employees are exempted from the hiring hall arrangement.

Union gave a preference to members on the out-of-work list over those who were not on that list, and held that this was a matter entirely within the Union's discretion.

The judge therefore concluded: (a) that the Union did not breach its duty of fair representation to the Charging Parties by giving preference to other union members in violation of Section 8(b)(1)(A); (b) that the Union did not violate Section 8(b)(2) by causing the Employer not to hire the Charging Parties; and (c) that the Employer did not violate Section 8(a)(3) and (1) in refusing to hire the Charging Parties. For the following reasons, we disagree.

## III. ANALYSIS AND FINDINGS

### *A. The Parties' Hiring Hall Arrangement was Nonexclusive*

We find that the evidence does not establish that the parties had an exclusive hiring hall arrangement. Accordingly, we conclude, as explained below, that the Union violated Section 8(b)(1)(A) and (2) and the Employer violated Section 8(a)(3).

It is undisputed that the NMA applied to the 2002 furnace work at Zug Island. That agreement does not, on its face, create an exclusive hiring hall arrangement between these parties. The NMA requires hiring "in accordance with the hiring procedure existing in the territory" where the work is to be performed. This clause requires application of local procedures, and thus does not create exclusivity in and of itself. A second clause of this NMA provision states: "[H]owever, in the event the Local Union is unable to fill the request of the Employer for employees within a forty-eight (48) hour period after such request for employees . . . the Employer may employ workmen from any source." This second clause also does not create an exclusive arrangement. It means only that *even if* a particular local hiring procedure is exclusive, the Employer may nevertheless hire from any source if, after 48 hours, the Union is unable to fill a request.

Thus the relevant inquiry is whether the local hiring *procedure* for the territory involved herein was exclusive or nonexclusive. We find that the local hiring procedure of these parties was nonexclusive.[6] In this regard, Employer agent Timothy Rushlow testified that he received no direction to secure employees only from the hiring hall, and that he had previously hired directly an employee for a job with the Employer. The Charging Parties testified that union members regularly sought and received jobs by calling companies directly, without going through the hiring hall. Indeed, the judge himself found that, "on some occasions in the past, the Union was aware that some of the Charging Parties had obtained employment without going through the hall and did not do anything to prevent them from doing so." This evidence of nonexclusive practice is consistent with the evidence in the prior *Kvaerner Songer* case that the Union "only referred a small fraction of employees for employment," and that "the Employer was free to, and did, hire employees who walked in from the street and who were referred to it by other employees."[7]

Additionally, although we find it unnecessary to determine whether article IV of the Local Agreement was incorporated into the NMA, we find that article IV is relevant in determining whether local hiring procedures for the territory are nonexclusive. Article IV provides that the employer agrees to give the Union "an opportunity" to supply employees, and that the employer "retains his right of freedom of selection from among all applicants." We agree with the General Counsel that this language establishes a nonexclusive hiring arrangement. Therefore, we find that the Agreement supports a finding that the local hiring practices were nonexclusive.[8]

In finding that the parties' practice was exclusive, the judge apparently relied on evidence of events that occurred *after* the Charging Parties were denied employment. In this regard, the Employer hired approximately 60 laborers for the 2002 Zug Island project, all of whom (except for three "regular" employees) were dispatched from the hall. However, as the General Counsel argues, the relevant hiring procedure is that which existed between the parties prior to and until September 3 and 4, when the Charging Parties were denied employment. As set forth above, the evidence supports the finding that during the relevant time period the parties' arrangement was nonexclusive.

[6] The General Counsel argues that the Union's placement of Charging Party Escobar in a job at Auto Alliance in Flat Rock, Michigan, without going through the hiring hall demonstrates that the Union did not follow orderly (i.e., exclusive) procedures with regard to referrals. We disregard this evidence because Escobar was appointed to that job pursuant to an NMA provision that allows direct appointments of stewards.

[7] *Kvaerner Songer*, 335 NLRB at 600.

[8] Chairman Battista concludes that the hiring hall provision of the Local 334 contract (art. IV) is not incorporated by reference into the NMA contract. The relevant provision of the NMA contract says only that the "hiring procedure existing in [the local] territory" is to be followed. The NMA does not say that art. IV of the Local contract is made a part of the NMA contract. Thus, the inquiry properly focuses on the actual procedures used, not the language of art. IV. Similarly, Chairman Battista does not pass on whether art. IV creates an exclusive hiring hall arrangement. As to the issue of what the local procedure was, Chairman Battista agrees with his colleagues that the local procedure does not establish an exclusive hiring hall arrangement during the relevant period.

Therefore, we conclude that the parties' hiring arrangement was nonexclusive.[9]

*B. The Union Violated Section 8(b)(1)(A) and (2); the Employer Violated Section 8(a)(1) and (3)*

As set forth above, on September 3 and 4, the Union insisted that the Charging Parties be replaced by members who had been dispatched by the Union. Specifically, Union Business Agent Tackett told Tony Peace that Escobar, Eric Garza, Sergio Garza, Jesus Alcorta, and Rene Gregorio Ramos could not be hired because they were not dispatched by the Union's hiring hall. Similarly, about a half hour after hiring Wilson, Laurain told Wilson that he had to "let him go," explaining that he had spoken with Scott Covington (from the Union), who "calls the shots," and that Covington did not want him there. Absent an exclusive hiring hall arrangement, the Union was not free to insist that the Employer terminate or refuse to hire the Charging Parties and replace them with individuals referred by the Union; by doing so, the Union violated Section 8(b)(1)(A) and (2).[10]

It is clear that but for the Union's unlawful pressure, the Employer would have hired Escobar, E. Garza, S. Garza, Alcorta and Ramos when they showed up for work on September 3 after Rushlow had offered them employment. With regard to Charging Party Wilson, the Employer actually hired him but "let him go" after pressure from the Union. Accordingly, we find that by acquiescing to the Union's unlawful demands that it refuse to hire, or terminate, the Charging Parties, the Employer violated Section 8(a)(3) and (1) of the Act.[11]

[9] The judge rejected the General Counsel's contention that the Employer and the Union are collaterally estopped from claiming that the hiring hall was exclusive by virtue of the Board's prior contrary finding in *Kvaerner Songer*, 335 NLRB 597 (2001), involving the same issue, parties, and worksite. In light of our conclusion that the parties' hiring hall arrangement was nonexclusive, we do not reach the question of collateral and judicial estoppel, which are argued by the General Counsel as an alternative ground for finding a nonexclusive hiring hall arrangement in this case.

[10] See, e.g., *Operating Engineers Local 17 (Combustion Engineering)*, 231 NLRB 1287, 1289 (1977) (absent an exclusive hiring hall arrangement, a union's causing or attempting to cause an employer to terminate or refuse to hire certain individuals and replace them with individuals referred by the union constitutes a violation of Sec. 8(b)(1)(A) and (2)); *Bricklayers Local 2 (Glenshaw Glass Co.)*, 205 NLRB 478, 481 (1973) (union violated Sec. 8(b)(1)(A) and (2) where, absent an exclusive hiring hall arrangement, it insisted that certain union members be replaced by other union members). See also *Sheet Metal Workers Local 16 (Parker Sheet Metal)*, 275 NLRB 867 (1985) (even absent an exclusive hiring hall, a union's causing an employer to refuse to hire an individual for union-related reasons violates Sec. 8(b)(1)(A) and (2)).

[11] See *Crouse Nuclear Energy Services,* 240 NLRB 390, 395 (1979); *H.H. Robertson Co.*, 263 NLRB 1344, 1345 (1982).

ORDER

The National Labor Relations Board orders that

A. The Respondent Union, Local 334, Laborers International Union of North America, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing employees of Kvaerner Songer, Inc., or any other employer, in violation of Section 8(b)(1)(A) of the Act;

(b) Causing or attempting to cause any employer with which the Union does not have an exclusive hiring hall arrangement to terminate the employment of, or refuse to hire, any employee because the employee failed to obtain the work through the Union's hiring hall; and

(c) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Jointly and severally with the Employer, make Michael Wilson, Clyde Escobar III, Jesus Alcorta, Eric Garza, Sergio Garza, and Rene Gregorio Ramos whole for any loss of earnings and other benefits they may have sustained as a result of the Union's discrimination against them, less interim earnings, plus interest;

(b) Immediately notify Kvaerner Songer, Inc., in writing, that there is no objection to the hiring or employment of Michael Wilson, Clyde Escobar III, Jesus Alcorta, Eric Garza, Sergio Garza, or Rene Gregorio Ramos;

(c) Within 14 days after service by the Region, post at its union office, hiring hall, and all other places where notices to members are customarily posted, copies of the attached notice. Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Respondent Union shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material; and

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent Union has taken to comply with this Order.

B. Respondent Employer, Kvaerner Songer, Inc., shall

1. Cease and desist from

(a) Discharging or refusing to hire any employee because the employee failed to obtain the work through a nonexclusive hiring hall.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Clyde Escobar III, Jesus Alcorta, Eric Garza, Sergio Garza, and Rene Gregorio Ramos instatement, and Michael Wilson reinstatement to the positions they applied for or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if the Respondent Employer had not discriminated against them.

(b) Jointly and severally with the Union, make the above-named discriminatees whole for any loss of earnings and other benefits they may have sustained as a result of the Employer's discrimination against them, less interim earnings, plus interest.

(c) Within 14 days after service by the Region, post copies of the attached notice at its Zug Island, Michigan facility, if any remains, and at any other of its facilities. Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. The Respondent Employer shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent Employer has gone out of business or closed the facility involved in these proceedings, the Respondent Employer shall duplicate and mail, at it own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 2002.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent Employer has taken to comply with this Order.

## APPENDIX A

### NOTICE TO EMPLOYEES AND MEMBERS
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal law and has ordered us to post and obey this notice.

WE WILL NOT cause or attempt to cause any employer with which we do not have an exclusive hiring hall arrangement to refuse to hire, or to terminate, the employment of any employee because he or she was not referred for the work through our hiring hall.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, jointly and severally with Kvaerner Songer, Inc., make Michael Wilson, Clyde Escobar III, Jesus Alcorta, Eric Garza, Sergio Garza, and Rene Gregorio Ramos whole for any loss of earnings and other benefits they may have sustained as a result of our discrimination against them, less interim earnings, plus interest.

WE WILL notify Kvaerner Songer, Inc., in writing, that there is no objection to the hiring or employment of the above-named discriminatees.

LOCAL 334, LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, AFL–CIO

## APPENDIX B

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal law and has ordered us to post and obey this notice.

WE WILL NOT discharge or refuse to hire any employee because he or she was not referred for the work through a hiring hall unless our Company and a union have an arrangement under which the hiring hall is the exclusive referral source.

WE WILL NOT in any like or related manner restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Clyde Escobar III, Jesus Alcorta, Eric Garza, Sergio Garza, and Rene Gregorio Ramos instatement, and Michael Wilson reinstatement to the positions for which they applied or, of those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled had we not discriminated against them.

WE WILL, jointly and severally with the Union, make Michael Wilson, Clyde Escobar III, Jesus Alcorta, Eric

Garza, Sergio Garza, and Rene Gregorio Ramos whole for any loss of earnings and other benefits they may have sustained as a result of our discrimination against them, less interim earnings, plus interest.

KVAERNER SONGER, INC.

*Ingrid L. Kock, Esq.,* for the General Counsel.
*Jeffrey E. Beeson, Esq. (Lanahan Reilley, LLP),* of Santa Rosa, California, for the Respondent Employer, Kvaerner Songer, Inc.
*J. Douglas Korney, Esq. (Korney & Heldt),* of Bingham Farms, Michigan, for the Respondent Union, Laborer's International Union, Local 334.

## DECISION

### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan, on July 14, 2002. The charges were filed September 16 and 17, 2002, and the complaint was issued December 30, 2002. The General Counsel alleges that the Respondent Union, Laborer's International Union Local 334, violated Section 8(b)(1)(A) and (2) of the Act in preventing Respondent Kvaerner Songer (Songer) from employing the Charging Parties,[1] all of whom are members of Local 334, at its worksite at Zug Island, Michigan, on or about September 3, 2002. The General Counsel alleges that Songer violated Section 8(a)(3) and (1) in refusing to hire the Charging Parties.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent Employer and Respondent Union, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, Kvaerner Songer, Inc., a corporation, is a construction contractor with headquarters in Washington, Pennsylvania. During 2001, Respondent performed services valued in excess of $100,000 outside of Pennsylvania. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Kvaerner Songer and the Respondent Union, Laborer's International Union, Local 334, admit that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

National Steel Corporation contracted with Respondent Kvaerner Songer to rebrick the number 1 stove at the A blast furnace at National Steel's Zug Island facility near Detroit in the fall of 2002. Between May and December 2000, Songer performed identical or similar work on the B furnace at National Steel's facility.[3]

Songer's work on the stove at the A furnace commenced on Tuesday, September 3, 2002, the day after Labor Day. On Friday, August 30, Tony Peace, Songer's general foreman, who is not normally based in the Detroit area, and Timothy Rushlow, a Detroit area Songer employee. Peace asked Rushlow to obtain five laborers to work for Songer at Zug Island on the morning of September 3.[4]

Rushlow called the Local 334 hall but was unable to get in touch with anyone. Then he called Clyde Escobar, one of the Charging Parties, who had worked for Songer on a prior job. Rushlow asked Escobar to come to Zug Island on September 3, with four other laborers. Escobar called charging parties Jesus Alcorta, Sergio Garza, Eric Garza, and Rene Ramos, all of whom were members of Local 334 and all five reported to the jobsite on September 3.

Tony Peace and Jeff Tackett, a union business agent, met the five at the facility's gate. Tackett and Peace informed the five that they could not work on the project because they were not on the Union's out of work list. Tackett informed Peace that if Songer hired anyone who was not dispatched from the union hall, the Union would file a grievance under the National Maintenance Agreement (NMA). This agreement is a collective-bargaining agreement to which Songer is a signatory with a number of unions, including the Laborer's International Union. The NMA was applicable to the work at the A blast furnace at Zug Island.

The five charging parties left and the union hall dispatched five other members who were on the out of work list. One of those dispatched was Realius Trammell. That night Trammell called a friend, Charging Party Michael Wilson, who was also a Local 334 member, and told him that work was available at Zug Island.

The next day, September 4, Wilson arrived at the project and met Andre Laurain, one of Songer's supervisors.[5] Wilson told Laurain that he was from the union hall. Laurain hired Wilson and another employee and sent them to an orientation. However, after about a half-hour, Laurain informed Wilson that he could not hire him.

Between Labor Day 2002 and January 2003, Songer hired approximately 60 laborers for the Zug Island project. All were dispatched by the Local 334 hiring hall except three "regular"

[1] Charging Party Jesus Alcorta, is Alcorta rather than Alcorto, as spelled in the caption to the complaint.

[2] At hearing, I received R. Exh. 2, a summary of Songer's personnel records for the Zug Island project. In a conference call with the parties, I reversed myself because on further reflection I concluded that Respondent failed to establish that the summary accurately reflected the underlying documents. In another conference call, I rejected R. Exh. 3, all or some of these underlying documents. I have not considered any of this material.

[3] The 2000 project is the subject of a Board decision involving the same parties, 335 NLRB 597 (2001).

[4] Rushlow had no other involvement with the Zug Island project.

[5] Wilson insisted at trial that he arrived at the jobsite on September 3, but I am certain he had his dates wrong and that he reported to Zug Island on September 4. Respondent Employer could have made the record much less confusing if it had stipulated that Wilson came to Zug Island to seek employment during the first week of September. Tony Peace testified that he had never seen Wilson, which I believe is true. Initially, I wondered whether Wilson ever sought employment with Songer. However, Wilson testified he spoke with Andre Laurain, who Songer admits was a supervisor and its agent, and who was not called as a witness by Songer. Thus, except for the minor discrepancy as to the date, I credit Wilson's testimony.

employees of Respondent, who were members of other unions. Members of the Union were not required to seek employment through the hiring hall at all times on other projects. On some occasions in the past, the Union was aware that some of the charging parties had obtained employment without going through the hall and did not do anything to prevent them from doing so.

Article XIX of the national maintenance agreement provides:

> *Hiring and Transfer of Craftworkers*
>
> 1. The Employer agrees to hire craftworkers in any territory where work is being performed or is to be performed in accordance with the hiring procedure existing in the territory where the work is being performed, or is to be performed, however, in the event the Local Union is unable to fill the request of the Employer for employees within a forty-eight (48) hour period after such request for employees (Saturday, Sundays and holidays excepted), the Employer may employ workmen from any source.

The General Counsel, however, contends that article IV of the Local collective-bargaining agreement between Local 334 and the Detroit Chapter of the Associated General Contractors applied to the project. Songer is not a signatory to this agreement, although in a prior case Songer and the Union stipulated that the work performed at Zug Island in 2000 was governed by this agreement, *Laborers Local 334 (Kvaerner Songer),* 335 NLRB 597, 598 (2001).

Article IV of the Local agreement provides:

> 1. (a) Beyond the employer's regular employees, including laid-off, laid off and collecting unemployment and/or transferred from another project of the same employer, the employer agrees to give the local union in the area an opportunity to supply any additional employees.
>
> (b) Regular employee shall be defined as one who has been on the payroll of said employer within the immediate past nine (9) months.
>
> 2. When requested, the Union agrees to furnish competent workers upon notification to the Business Manager or Business Agent of the Union and further, the Employer agrees that beyond his regular employees he will give the Local Union in the area an opportunity to supply any additional employees. The Employer retains his right of freedom of selection of employees from among all applicants.

Article IV requires that each employee must become and remain a member of the Union after the 7th calendar day of his employment.

## ANALYSIS AND CONCLUSIONS OF LAW

It is well settled that a union which enjoys the status of exclusive collective-bargaining representative has an obligation to represent employees fairly, in good faith, and without discrimination against any of them on the basis of arbitrary, irrelevant, or invidious distinctions. *Vaca v. Sipes,* 386 U.S. 171 (1967). However, so long as a union exercises its discretion in good faith and with honesty of purpose, it is allowed a wide range of reasonableness in the performance of its duties. *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953); *Air Line Pilots v. O'Neill,* 499 U.S. 65 (1991).

On the other hand, if a union favors one group of represented employees for reasons that interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, or reasons that are arbitrary, or demonstrate bad faith, it violates Section 8(b)(1)(A). For example, a union may not, at least in some circumstances, favor one group of represented employees because they have been members of the union for a longer period of time. *Teamsters Local 42 (Daly, Inc.),* 281 NLRB 974 (1986), enfd. 825 F.2d 608 (lst Cir. 1987); *Teamsters Local 435 (Super Valu, Inc.),* 317 NLRB 617 fn. 3 (1995). A collective-bargaining representative may not, at least in some circumstances, favor members of one local union over another. *Reading Anthracite Co.,* 326 NLRB 1370 (1998).

There is no question that the Union discriminated against the charging parties. However, Local 334 did not do so in a manner that would "encourage or discourage membership in any labor organization." Thus, the Union did not violate Section 8(b)(1)(A) or (b)(2) and Songer did not violate Section 8(a)(3) and (1) in denying the charging parties employment.

There is nothing invidious, arbitrary or demonstrating bad faith about giving preference to members on the out of work list over those who are not on the list.[6] This is a matter entirely within the Union's discretion.

At hearing, the parties argued about which collective-bargaining agreement applied and whether or not the Union was operating an exclusive hiring hall at Zug Island.[7] A union operating a nonexclusive hiring hall does not have a duty of fair representation to its members with regard to the management of the hall. *Teamsters Local 460 (Superior Asphalt),* 300 NLRB 441 (1990). This is so because members can obtain employment without going through the hiring hall. *Carpenters Local 537 (E. I. Dupont),* 303 NLRB 419 (1991).

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[6] Charging Party Michael Wilson was apparently on the out of work list. However, there has been no allegation that Local 334 dispatched employees from that list in an irregular or improper manner.

[7] The General Counsel argues that Respondents are collaterally estopped from arguing that the Union maintained an exclusive hiring hall by virtue of the Board's prior decision involving the same parties at the same worksite. However, in order for the doctrine of collateral estoppel to apply, the issue that has been foreclosed must have been necessary to support the judgment entered in the prior proceeding, *Big D Service Co.,* 293 NLRB 322, 323 (1989). The Board's and judge's decision that Songer maintained a nonexclusive hiring hall was not necessary to support the judgment that the Union violated Section 8(b)(2) with regard to employee Arthur Stites, a member of a different local, in July 2000. In fact, in the prior case, the General Counsel argued that the parties had maintained an exclusive hiring hall and the judge found that the General Counsel had failed to establish the existence of an exclusive hiring hall arrangement. The judge and the Board found that the Union violated Sec. 8(b)(2) despite the General Counsel's failure to prove the existence of an exclusive hiring hall.

Finally, there has been no showing that the contractual provisions applicable to the 2000 work on the stove at blast furnace B were also applicable to the work done on the stove at blast furnace A in 2002. I find that Respondents are not collaterally estopped by the prior decision.

In the instant matter, it hardly matters which contract applied because the Union and Songer established an exclusive hiring hall by practice and operation. *Teamsters Local 174 (Totem Beverage),* 226 NLRB 690 (1976). Thus, Local 334 had a duty of fair representation to its members in its operation of the hiring hall at Zug Island in the fall of 2002. However, that duty is breached only if the Union gives preference to one member over another on an impermissible basis, such as support for the incumbent union leadership, *Morrison-Knudsen Co. (Tenn-Tom Constructors),* 291 NLRB 250 (1988). In this case, Local 334 discriminated, but on a basis that it is not impermissible under the Act.

SUMMARY OF CONCLUSIONS OF LAW

1. Respondent Laborers International Union, Local 334 did not breach its duty of fair representation to the Charging Parties by giving preference to other union members on the out of work list in the administration of its exclusive hiring hall, and did not violate Section 8(b)(1)(A).

2. Respondent Laborers International Union, Local 334 did not violate Section 8(b)(2) of the Act, as alleged, by causing Kvaerner Songer not to hire the Charging Parties.

3. Respondent Kvaerner Songer did not violate Section 8(a)(3) and (1) in refusing to hire the Charging Parties, as alleged.

[Recommended Order for dismissal omitted from publication.]